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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD,
Petitioners,
v.
MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.* For over a decade, ATRA has filed principal *amicus curiae* briefs in cases before this Court that have addressed important liability issues, including the recent landmark punitive damages decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), and the

* Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

medical device "preemption" decision in *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996).

ATRA submits this brief to further this Court's understanding of the specific policy issues presented by medical monitoring damages, a core issue in this case. ATRA urges this Court to reverse the decision of the Second Circuit Court of Appeals.

STATEMENT OF THE CASE

ATRA adopts Petitioner's summary of the dispute in question.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

ATRA submits that decisions about whether to establish complex and revolutionary changes in liability law, if at all, such as the award of damages for so-called "medical monitoring," are best addressed by Congress and state legislatures. A principal reason is that legislatures have the ability to consider diverse points of view and create prospective rules of law. Courts, on the other hand, are not well-equipped to determine complex tort policy rules, because their perspective is typically limited to arguments from opposing counsel seeking to advance purely *private* interests. Further, when courts "make" law, they do so retroactively, denying "fair notice" to the public about rights and responsibilities that may result from significant new changes in the law.

For over 200 years, a fundamental principle of tort law has been that liability should only be imposed when a person has suffered an injury. There is a reason for this basic rule. In order to determine whether money should be transferred from a defendant to a plaintiff, a jury needs some objective manifestation that an individual has been harmed. In this case, however, the Second Circuit Court of Appeals chose to allow an award for "medical monitoring" damages under the Federal Employers' Liability

Act ("FELA"), 45 U.S.C. § 51, even though the plaintiff currently suffers *no harm* and no symptoms of harm.

Whether individuals should receive damages from private parties for medical monitoring is a question for legislatures, not courts, to answer. There are several reasons why this is true.

First, legislatures can devise clear and sound "triggers" that identify the specific circumstances under which a claimant may be eligible for a medical monitoring award; courts have not demonstrated the ability to do so. Second, courts cannot assure that awards for medical monitoring will actually be used for that purpose — tort awards are made in lump sums. The lump sum award could be used for purposes having *nothing* to do with medical monitoring. Legislation could address this problem. Third, courts do not have the scientific knowledge to determine when and if medical monitoring is appropriate. Legislatures are in a better position to obtain such information. Finally, the few courts that have decided to create this "new tort" have given no consideration to the fact that the plaintiff already may have opportunities for medical monitoring under workers' compensation or a health insurance plan. A legislature could consider whether the "new tort" should be limited to people who do not have existing resources that provide for medical monitoring.

In sum, legislative questions deserve legislative answers — they are not questions that can or should be addressed by courts.

ARGUMENT

I. CONGRESS AND STATE LEGISLATURES ARE THE MOST APPROPRIATE FORUMS TO DETERMINE WHETHER A MEDICAL MONITORING REMEDY IS NEEDED AND HOW IT SHOULD BE IMPLEMENTED.

For much of this Nation's history, courts developed tort law in a slow, incremental fashion. That process generally worked well. In recent years, however, the in-

cremental approach has been abandoned in some cases, resulting in potentially large *adverse* consequences to the Nation's civil justice system and those who must abide by its rules.

Early in the asbestos litigation, courts empathetic to the claims of asbestos claimants deviated from accepted legal principles to permit recoveries that traditionally would have been barred. As the courts lowered legal standards, new plaintiffs flooded the civil justice system. While the courts in these cases may have had good intentions, the litigation turned into a judicial "disaster of major proportions." [1] People with very serious harms had to wait long periods of time before courts could hear their cases; some did not live to obtain a remedy. The problem of separating out and quickly assisting seriously injured persons, now caught up in an ever-widening sea of litigation, was so great that the judiciary *sought* congressional intervention to address the crisis, explaining that the "courts [were] ill-equipped to meet [it] effectively." [2]

The legacy of those early decisions continues. In this case, the Second Circuit Court of Appeals embraced a novel theory of recovery (*i.e.*, the award of "medical monitoring" damages) that is contrary to traditional common law principles and has been recognized in only a tiny number of jurisdictions.[3] For over 200 years, the traditional tort law rule has been that a plaintiff must

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[1] Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report of the Ad Hoc Committee* 2 (1991).

[2] *Id.*

[3] *See Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) (*"Paoli II"*), *cert. denied sub nom. General Elec. Co. v. Ingram*, 499 U.S. 961 (1991); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Buckley v. Metro-North Commuter R.R. Co.*, 79 F.3d 1337 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996).

suffer actual injury before he or she will receive an award in tort.[4] The rationale of the rule is that tort law needs some basic boundaries.

Medical monitoring claims raise difficult and complex issues. These issues are *extremely* broad, and are not subject to judicial control. In that regard, on a daily basis, almost everyone comes into contact with a potentially limitless number of materials that, arguably, may warrant a "medical monitoring" remedy.[5] Who should be eligible for that remedy? Lawyers in the courtroom, however helpful, cannot resolve that key issue.

ATRA submits that decisions to establish retroactive, wholesale, and complex changes in liability law, including the award of damages for medical monitoring, are best addressed by Congress and state legislatures. This is particularly the case where, as here, the underlying cause of action is statutorily-based.[6] Courts may not rewrite the FELA statute to provide medical monitoring damages;

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[4] *Cf. Urie v. Thompson*, 337 U.S. 163, 170 (1949) (a party bringing suit under the FELA suffers a compensable injury only when "the accumulated effects of the deleterious substance manifest themselves") (citation omitted).

[5] Everyone is exposed "to potential health hazards each day through the air they breathe, water they drink, food and drugs they ingest, and on the land on which they live." Terry C. Gay & Paige F. Rosato, *Combatting Fear Of Future Injury And Medical Monitoring Claims*, 61 Def. Couns. J. 554, 562 (1994).

[6] *See generally* Roger S. Fine, *A Personal Perspective from the "Manufacturer,"* 55 Brook. L. Rev. 899, 903 (1989) ("[L]et us go back to the days when there was a real difference between the judicial and legislative branches. When a court is faced with a problem that is a social one rather than a legal one, we defer to the legislature, which has far more flexibility and power to mold solutions that match our problems"); Stephen A. Spitz, *From Res Ipsa Loquitur to Diethylstilbestrol: The Unidentifiable Tortfeasor in California*, 65 Ind. L.J. 591, 634 (1990) ("[M]any situations are better left in the legislative domain and/or are best addressed by providing administrative remedies").

it is up to Congress, if it desires to do so, to change the law.[7]

A. Legislatures Are Better Equipped Than Courts To Address The Broad Public Interest In Medical Monitoring.

Courts are particularly well-suited to adjudicate individual disputes concerning discrete issues and parties. The Founding Fathers recognized this when they drafted the Constitution to give the judiciary jurisdiction to decide "cases and controversies."[8] This particularized focus, however, involves some basic limitations; it deprives the judiciary of the comprehensive access to information that is essential to the formation of complex and sound national tort policy rules.

Legislatures, on the other hand, are well-equipped to reach *fully* informed positions about the need for widespread changes in the law. They have more complete access to information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, a witness can be recalled. This process allows legislatures to engage in broad policy deliberations.[9]

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[7] In an analagous case where a statutorily-based remedy was at issue (*i.e.*, a request for judicial modification of the application of joint and several liability to the Longshore and Harbor Workers' Compensation Act), the Fifth Circuit Court of Appeals recently held: "[T]he Congress is in a better position than a court to evaluate various policy objectives. We are persuaded that deferring to congressional action here is the wiser course." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1138 (5th Cir. 1995).

[8] *See* U.S. Const. art. III, § 2, cl. 1.

[9] *See generally Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 736 (Haw. 1991) (Moon, J., concurring in part and dissenting in part) (disagreeing with the majority's application of "market share liability" to a blood products case, because "[t]here are too many unanswered questions of social, economic, and legal import which only the legislature, with its investigative powers and procedures, can determine"); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986) ("[A]warding damages . . . by means of a court-constructed device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain").

Accordingly, legislatures are in the best position to consider whether a medical monitoring remedy is needed, and if it is needed, to resolve its complex issues.[10]

B. Legislatures' Prospective Treatment Of The Law Is Better Suited For Implementing Medical Monitoring Awards Than Courts' Retroactive Treatment Of The Law.

Adoption of a novel remedy, such as medical monitoring, that denotes a sweeping change of the rights and responsibilities of the public, should be done prospectively, if at all, to provide "fair notice" to everyone potentially affected.

Courts, following the common law process, institute their rulings on a retroactive basis. Although this may be appropriate when implementing minor adjustments to common law principles, it is not appropriate when the "adjustments" precipitate a broad, fundamental change in an available tort remedy.

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[10] As this Court has stated, when "[m]any groups of persons with varying interests are vitally concerned . . . . We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups." *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1951). The American Law Institute's new draft Restatement on the law of products liability similarly suggests that when the government has superior access to information, it, rather than the courts, should act. *See Restatement Of The Law Of Torts: Products Liability* § 20 cmt. *a* (Proposed Final Draft (Preliminary Version) Oct. 18, 1996) ("Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding ramifications of such undertakings").

By way of contrast, legislative consideration of medical monitoring will result in prospective legislation that will give the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As this Court said in its most recent decision on the subject of punitive damages, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598 (1996) (emphasis added). Courts do not have the ability to provide this "fair notice"; legislatures can.

C. Creating A New Cause Of Action For Medical Monitoring Does Not Represent A Traditional Development Of The Common Law.

It may be argued that the Second Circuit's creation of a "new cause of action" for medical monitoring is simply a traditional development of the common law. This argument does not correspond to the facts.

First, the Second Circuit was not merely developing traditional "common law" without a statutory base. Since 1908, the FELA statute has been in existence and subject to construction based on congressional intent.[11] If changes are needed, Congress can choose to amend the Act.[12] In 1908, allowing a cause of action where an individual was not injured at the time he or she brought

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[11] *See* William Prosser and Page Keeton, *The Law Of Torts*, § 80 at 577 (5th ed. 1984).

[12] As this Court stated in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272-273 (1979) (citations omitted):

> [W]e are mindful that here we deal with the interface of statutory and judge-made law. * * * By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances.

the claim was simply inconceivable.[13] There is nothing in the legislative history or in the common law at the time the FELA statute was enacted that provides even a scintilla of evidence to suggest a basis for medical monitoring damages awards.

Second, the Second Circuit's creation of a cause of action for medical monitoring is different in both form and substance from traditional common law developments in the law of torts. They have been incremental in nature.[14]

For example, the doctrine of contributory negligence had its origin in the English case of *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). In 1854, a Pennsylvania judge called the defense "a rule from time immemorial" and ventured to guess that it was "not likely to be changed for all time to come." *Pennsylvania R.R. Co. v. Aspell*, 23 Pa. 147, 149 (1854). The judge who wrote the opinion was a poor prognosticator of history, but he must be given some credit as the rule took more than 150 years to change in common law development. In time, exceptions were created to the rule, such as not applying it when the defendant had a "last clear chance" to avoid an accident or where the defendant engaged in "reckless" behavior.[15] Gradually, "comparative negligence" statutes were enacted.[16] But, it was not until 1973 that the first common law decision permitted comparative fault as a general rule, and that was in a state that had already used comparative fault in a wide matrix of specific statutes.[17]

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[13] *See generally* William Prosser and Page Keeton, *supra* note 11, § 54 at 361.

[14] *See id.*, § 80 at 578 (noting that the history of the FELA statute has been one of *"gradual"* liberalization) (emphasis added).

[15] *See id.*, § 66 at 462-464.

[16] *See* Victor E. Schwartz, *Comparative Negligence* (3d ed. 1994).

[17] *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

When other changes have developed in the common law, such as the development of strict products liability, they have occurred gradually. For example, it took almost *fifty* years from the time of then-Judge Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916), removing the privity barrier in product liability negligence cases, before the New Jersey Supreme Court decided *Henningsen v. Bloomfield Motor Co.*, 161 A.2d 69 (N.J. 1960), removing the privity barrier in implied warranty actions involving personal injury. Three additional years passed before Judge Traynor, writing for the California Supreme Court, recognized privity-free strict liability in tort in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Several more years passed before the rule of strict product liability became the common law of most states. *See* John W. Wade *et al.*, *Prosser, Wade and Schwartz's Cases and Materials On Torts* 717 (9th ed. 1994). Even when this expansion occurred, a fault base remained in the key areas of product design and warnings.[18]

The same slow, meticulous, evolvement of the common law has been true with other tort law developments, such as the modification of traditional immunities, permitting recovery for a child who had been injured in the womb, or modification or abolition of the assumption of risk defense.

In point of fact, one can find no example where a court on a common law basis retroactively overruled a fundamental principle of tort law, like the one at issue here, that a plaintiff must suffer a current harm in order to bring a tort claim.

The claim allowed in the instant case occurred without any forewarning or "evolvement" in the case law. The Second Circuit did not engage in a gradual abolition of

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[18] *See Restatement Of The Law Of Torts: Products Liability* § 2 (Proposed Final Draft (Preliminary Version) Oct. 18, 1996).

a traditional defense or incremental development of the common law. Unfortunately, the Court of Appeals' decision represents judicial retroactive legislative lawmaking and is wrong as a matter of history and public policy. If a claim is to be allowed for medical monitoring, as this brief will show, it is a subject for legislative action.[19]

II. COMPLEX ISSUES WHICH SHOULD BE CONSIDERED BEFORE MEDICAL MONITORING IS AWARDED DEMONSTRATE WHY LEGISLATURES PROVIDE A BETTER FORUM THAN COURTS FOR IMPLEMENTING THE REMEDY.

Recognition of the medical monitoring remedy in this case could lead to an administrative "nightmare" that a fully informed judiciary may solidly wish to avoid.

A. Legislatures Are In The Best Position To Establish A Clear And Sound "Trigger" As To When Medical Monitoring Is Appropriate.

Before parties can be given access to medical monitoring, a clear and sound "trigger" must be set to identify the specific circumstances under which a claimant may be eligible for a medical monitoring award.

A proper "trigger" analysis requires access to information from numerous sources, particularly scientific and medical experts, that is only partly available to courts.[20] Legislatures, on the other hand, are not limited to information produced by plaintiffs and defendants; if they need additional information, they may initiate information gathering (*e.g.*, epidemiological studies).

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[19] *See Harrison v. Montgomery Co. Bd. of Educ.*, 456 A.2d 894, 904 (Md. 1983) (stating that the judiciary should defer "to the legislature where change is sought in a long-established and well-settled common law principle").

[20] In addition, in the absence of plaintiff-produced evidence, it is unfair to assign to individual defendants the costs of investigating the "public benefit" of monitoring and treatment for exposures.

In the past, courts have *not* demonstrated an ability to articulate specific or consistent eligibility requirements for medical monitoring. The Second Circuit's vague and ambiguous "standard" in this case illustrates this point well:

> Buckley suffered a substantial impact from asbestos that has significantly increased his risk of contracting an asbestos-related disease and that Buckley should receive medical monitoring in order to ensure early detection . . . .

Buckley, 79 F.3d at 1347.[21]

By way of contrast, Congress and state legislatures have devised effective "triggers" for programs that address and rectify public concerns. For example, the federal Occupational Safety and Health Act, 29 U.S.C. §§ 651-78, and its extensive implementing regulations clearly define permissible exposure levels for hazardous substances used in the workplace and provide for surveillance procedures to determine whether workplaces exceed those levels.[22] In

[21] *See also Ayers*, 525 A.2d at 312 (monitoring appropriate when "there is a significant but unquantified risk of serious disease" such that monitoring is "reasonable and necessary"); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 788 (monitoring appropriate when there is a "significantly increased risk to plaintiff of contracting a serious disease" such that "periodic testing is reasonably necessary"); *Potter*, 863 P.2d at 824 (to recover there must be a "significant, but not necessarily, likely risk of disease" that makes the need for monitoring "reasonably certain").

[22] *See, e.g.*, 29 C.F.R. § 1910.1001(d), (1) & App. H (July 1, 1995) (regulations regarding occupational asbestos exposure). In addition, the federal government formed the United States Preventive Services Task Force, which performed an exhaustive study and published recommendations concerning the effectiveness of clinical preventive services. The latest culmination of the Task Force's efforts is the 1996 *Guide To Clinical Preventive Services* (2d ed. 1996). This publication provides, *inter alia*, a "trigger" for determining whether and how medical monitoring should be conducted to detect disease.

other legislation, Congress has provided for medical monitoring.[23]

Vague and ambiguous medical monitoring "triggers," such as the one set forth by the Second Circuit in this case, do not give the public "fair notice" of medical monitoring eligibility requirements. The resulting uncertainty invariably will lead to inconsistent decisions among jurisdictions, causing disparate treatment of similarly situated plaintiffs. It will also result in costly litigation as parties seek to clarify their rights and duties.[24]

B. Legislatures Are In The Best Position To Ensure That Medical Monitoring Awards Serve Their Intended Purpose.

A significant problem that arises when medical monitoring is awarded by courts, as opposed to legislatures and administrative agencies, is that courts cannot ensure that parties receiving awards will actually use them to procure monitoring.

In most medical monitoring cases, plaintiffs seek,[25] and are granted, lump sum awards.[26] Yet, courts cannot dic-

[23] For instance, Congress created The Agency for Toxic Substances and Disease Registry, which in specific circumstances, may initiate "medical testing . . . of population subgroups to screen for diseases." 42 U.S.C. § 9604(i)(9)(A).

[24] A lack of consistency and specificity in judicially created eligibility standards has proved disastrous in the asbestos litigation. Trials have essentially become "games of chance," because of the lack of clearly delineated standards for recovery. Even when similarly situated plaintiffs have tried their cases in the same jurisdiction, awards have been inconsistent. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1852-1859 (1992).

[25] *See, e.g., Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986); *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847 (M.D. Pa. 1988).

[26] *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 533 (1983). Moreover, it is doubtful that courts have the discre-

tate how damages recipients will spend a lump sum award.[27] The medical monitoring award itself is not appropriately monitored, so there is no assurance that the award, however large, will be used to help a person learn about the onset of avoidable disease.

Legislatures have the power to design medical monitoring programs that provide appropriate testing,[28] and ensure that damage awards, from whatever source, are actually used to pay the expense of medical monitoring. Courts and commentators alike have advocated the use of periodic payment plans to secure the efficient, fair, and proper allocation of medical monitoring awards.[29] Legislatures are well situated to devise and implement periodic payment plans and effectively have done so.[30]

C. Legislatures Are In The Best Position To Ensure That Medical Monitoring Is Only Used When It Confers A Real Benefit.

Medical monitoring should be instituted only if the benefits of testing outweigh the costs. An appropriate cost-benefit analysis in the context of medical monitoring requires the decisionmaker to consider a host of complex and intricately intertwined factors that courts may not have the resources to formulate or weigh.

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tion to award other than lump sums in tort actions. *See Frankel v. United States*, 321 F. Supp. 1331, 1341 (E.D. Pa. 1970), *aff'd sub nom. Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972); *Lozada ex rel. Lozada v. United States*, 140 F.R.D. 404, 416 (D. Neb. 1991), *aff'd*, 974 F.2d 986 (8th Cir. 1992).

[27] *See, e.g., Ayers*, 525 A.2d at 314.

[28] *Cf.* 29 U.S.C. §§ 651-78.

[29] *See, e.g., Ayers*, 525 A.2d at 314; Amy B. Blumenberg, *Medical Monitoring Funds*, 43 Hastings L.J. 661, 683 n.112 (1992) (*citing* numerous commentators).

[30] State legislatures have passed statutes providing awards through periodic payments for social concerns such as alimony, child support, no-fault automobile liability, medical malpractice, and workers' compensation. *See* Amy B. Blumenberg, *supra* note 29, at 686-687.

For example, the decisionmaker should be required to assess the accuracy of each proposed monitoring test to determine that it is reliable. That assessment should entail an analysis of prevalence (*i.e.*, the proportion of the population with the suspect condition) and the proposed test's scientific sensitivity, specificity, and positive and negative predictive value. Without this assessment, the decisionmaker will not be able to discern risks inherent in the testing procedure, such as the incidence of false positives and false negatives — incorrect test results that can induce destructive psychological reactions, and in the case of false positives, lead to additional testing and treatments that carry a number of additional risks. This single example illustrates the complexity of the cost-benefit analysis that must be conducted prior to determining the viability of a medical monitoring remedy.

As this Court can appreciate, access to a substantial amount of complex, scientific information is imperative to the analysis. Legislatures, with their broad investigative powers and resources, are in a better position than courts to acquire and consider this information.

D. Administrative Burdens Detract From Judicial Supervision Of Medical Monitoring.

Courts are not equipped to handle the administrative procedures needed to ensure that medical monitoring remedies serve their limited purpose. Implementation and administration of a sound plan will require, at a minimum: specifying the nature and amount of benefits available, specifying the source of funding and funding allotments, defining procedures for determining eligibility for monitoring, defining when eligible parties may join the program, and determining program duration and how it will be implemented (*e.g.*, formal versus informal facility testing; designated service provider versus participants'

chosen provider).[31] Moreover, as the program matures, its scope and administrative operation inevitably will require change, especially if the program designer erroneously estimates funding needs or the number of eligible participants.[32]

A further administrative issue arises if third-party payment plans overlap with the medical monitoring program. If an eligible party's monitoring is already covered by a health care insurer[33] and there is no proof of injury, a basic public policy question arises as to whether the "collateral source rule" should apply. Under the rule, benefits received by a claimant from health or medical insurance, disability insurance, workers' accident compensation benefits, and government benefits, in legal terms are deemed "collateral" to the tortfeasor, since the tortfeasor did not pay for them, and are not deducted in calculating the amount of the claimant's alleged damages.[34] Extension of this rule beyond traditional tort law where someone is harmed, to a brand new claim where

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[31] *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-272 (1994); Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1985-1986 (1992).

[32] For example, a court-guided trust set up to administer asbestos claims against the Johns-Manville Company "settled [only] 25,000 out of more than 140,000 claims [before] deplet[ing] its funds." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *supra* note 1, at 25.

[33] Approximately eighty percent of all standard medical testing is paid for by third party insurance. *See* American Law Institute, 2 *Enterprise Responsibility for Personal Injury — Reporters' Study* 379 (1991).

[34] *See* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966). A plaintiff, however, does not necessarily recover double when the collateral source rule is applied. Health insurance contracts, for example, may provide that the insurer is to be subrogated to the insured's tort

an individual suffers no harm, is inappropriate and against public policy.[35]

CONCLUSION

Courts, in accord with constitutional dictates, are not structured to devise and supervise medical monitoring remedies. Legislatures, on the other hand, not only have authority to confront and resolve the broad public policy tort issues raised by medical monitoring, but they also have the necessary tools to do so in a sound manner — access to nearly limitless sources of information and the ability to initiate legislation prospectively. The inappropriateness of a court acting on a matter of legislative priority is particularly acute where the legislative body,

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claim. *See* John W. Wade *et al.*, *Prosser, Wade and Schwartz's Cases and Materials On Torts* § 2 at 522 (9th ed. 1994). There has been substantial criticism of the collateral source rule. *See* American Law Institute, *supra* note 33, at 161-182 (recommending abolition of collateral source rule, except with respect to life insurance); Victor E. Schwartz, *Tort Law Reform: Strict Liability And The Collateral Source Rule Do Not Mix*, 39 Vand. L. Rev. 569 (1986). Recent data suggests that use of the "collateral source" rule contributes to inflated damages claims. *See* Steven Carroll and Allan Abrahamse, *The Costs Of Excessive Medical Claims For Automobile Personal Injuries* (RAND Institute For Civil Justice, March 1995). *See also* Jeffrey O'Connell, *Must Health And Disability Insurance Subsidize Wasteful Injury Suits?*, 41 Rutgers L. Rev. 1055 (1989).

[35] *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W.Va. 1990) (the costs of monitoring awards to asymptomatic plaintiffs could "devastate" defendants), *aff'd*, 958 F.2d 36 (4th Cir.), *cert. denied*, 502 U.S. 1033 (1992); *Ayers*, 525 A.2d at 297 (township liable for over $8,000,000 in monitoring costs). The rule's application becomes more suspect when the eligible party's monitoring tests are no different than those that third parties should submit to who are not at a higher risk for disease. *See Potter*, 863 P.2d at 825; *Redland Soccer Club v. Dep't of Army*, 55 F.3d 827, 848 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). In these circumstances the collateral source rule should not apply, and the eligible party, or his insurer, should bear the testing expense. *Id.*

in this instance Congress, has created the basic remedy and, if it desires to do so, can amend it.

For these reasons, the decision of the Second Circuit Court of Appeals should be overturned.

Respectfully submitted,

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